

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

INSTANT ONE MEDIA, INC., Plaintiff, v. EZFAUXDECOR, LLC, et al., Defendants.	Civil Action Number 1:19-cv-00540-WMR
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PLAINTIFF'S MEMORANDUM ON O.C.G.A. § 13-6-11

On 2020-Jun-17, during the Pretrial Conference,¹ the Court permitted Plaintiff to brief the following two (2) issues:

- (A) Whether or not a jury can award litigation expenses pursuant to O.C.G.A. § 13-6-11 for a federal claim.
- (B) Whether or not Defendants' actions during litigation (*e.g.*, altering evidence, stubborn refusal to admit, refusal to stipulate to facts that were previously admitted, *etc.*) are relevant under O.C.G.A. § 13-6-11.

I. LEGAL AUTHORITY

A. Fees Are Proper Under O.C.G.A. § 13-6-11 Even When Only a Federal Claim Is Submitted to the Jury

"There is no requirement that a viable state law claim exist in order for the jury to award litigation expenses pursuant to O.C.G.A. § 13-6-11. Rather, O.C.G.A. § 13-6-11 constitutes a vehicle for the collection of attorney fees even

when only a federal law claim for damages is submitted to the finder of fact."²

Clearly, Georgia law permits recovery under O.C.G.A. § 13-6-11 for federal claims (such as Plaintiff's trademark claim).

B. Under O.C.G.A. § 13-6-11, Defendants' Behavior During Litigation Is Relevant in Establishing That the Work of Plaintiff's Counsel Is Reasonable

Under O.C.G.A. § 13-6-11, Defendants' conduct during litigation is relevant in establishing the reasonableness of the work performed by Plaintiff's counsel.

To be clear, under O.C.G.A. § 13-6-11, there are at least two (2) separate issues: (a) first, whether Defendants acted in bad faith; and, if so, then (b) second, whether the award of fees to Plaintiff is reasonable. Evidence of Defendants' conduct during litigation (*e.g.*, deliberate alteration of evidence, refusal to admit what should plainly be admitted, refusal to stipulate to prior admissions, *etc.*) is relevant and admissible for the second issue (not necessarily for the first issue).³

Under O.C.G.A. § 13-6-11, Plaintiff's counsel is required to show that the

¹ Doc. 92, filed 2020-Jun-17.

² *Fulton County v. Legacy Inv. Group, LLC*, 296 Ga. App. 822, 827 (2009) (emphasis supplied).

³ To avoid any doubt, Plaintiff's evidence shows both: (a) Defendants' bad faith in breaching the contract and infringing Plaintiff's trademarks (the first issue); and (b) Defendants' bad acts that necessitated the work done and fees incurred by Plaintiff.

fees and expenses are reasonable.⁴ Consequently, if wrongful acts by Defendant necessitated extra or excessive work for Plaintiff, then the fees for that extra work should be recoverable by Plaintiff.⁵ As noted by one commentator, "[o]f course, if bad acting occurs during the litigation, the amount of the O.C.G.A. § 13-6-11 claim may be increased because the work attributed to the prevailing claim may be more."⁶ Consistent with this principle, the Court of Appeals of Georgia has upheld an award of attorney's fees that exceeded the actual judgment when the defendant "denied all liability for any amount of damages and was intractable in its position prior to, during, and after the trial"⁷ (similar to how Defendants have denied all liability in this case).

At bottom, under O.C.G.A. § 13-6-11, Defendants' behavior during litigation

⁴ *Eways v. Georgia R.R. Bank*, 806 F.2d 991 (11th Cir. 1986), citing *First Bank of Clayton County v. Dollar*, 159 Ga. App. 815 (1981) ("an award for litigation expenses under O.C.G.A. § 13-6-11 must be supported by evidence that the expenses were reasonable").

⁵ See, e.g., ICLE Program Materials on Abusive Litigation, 2019-Feb-14, Penland on O.C.G.A. § 13-6-11, p. 53, available from the State Bar of Georgia ("The applicant must prove that the extra or excessive work was necessitated by the specific wrongful acts of the respondent" (citing *Connolly III et al. v. Smock*, A16A0741 (September 30, 2016))). It is also worthwhile to note that "all expenses of the litigation proximately related to the pending claim should be recoverable, including expenses of in-house counsel and travel necessitated by the litigation." *Salsbury Labs, Inc. v. Merieus Labs, Inc.*, 735 F. Supp. 1555 (M.D. Ga. 1989), *aff'd.*, 908 F.2d 706 (11th Cir. 1990).

⁶ *Id.*, p. 5.

⁷ *Beaudry Ford, Inc. v. Bonds*, 139 Ga. App. 230, 231 (1976).

is both relevant and admissible.

II. CONCLUSION

The law is clear: (a) a jury can award litigation expenses under O.C.G.A. § 13-6-11 for a federal claim (even if no viable state claim exists); and (b) evidence of Defendants' conduct during litigation is relevant and admissible under O.C.G.A. § 13-6-11.

Respectfully submitted, 2020-Jun-18.

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INSTANT ONE MEDIA, INC., Plaintiff, v. EZFAUXDECOR, LLC, <i>et al.</i>, Defendants.	Civil Action Number 1:19-cv-00540-WMR CERTIFICATE OF COMPLIANCE PURSUANT TO LR 7.1D
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CERTIFICATE OF COMPLIANCE PURSUANT TO LR 7.1D

The undersigned counsel hereby certifies that **PLAINTIFF'S**
MEMORANDUM ON O.C.G.A. § 13-6-11 has been prepared using one of the
font and point selections approved in LR 5.1 NDGa.

Respectfully submitted, 2020-Jun-18.

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CERTIFICATE OF FILING AND SERVICE

Plaintiff certifies that **PLAINTIFF'S MEMORANDUM ON**
O.C.G.A. § 13-6-11 was filed using the CM/ECF system, which will send
notification of such filing to all counsel of record in this matter.

Respectfully submitted, 2020-Jun-18.

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